

UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:	)	EB Docket No. 02-21
)	
PENINSULA COMMUNICATIONS, INC.	)	File No. EB 01-IH-0609
	)	FRN: 0001-5712-15
Licensee of stations)	
KGTL, Homer, Alaska;	)	Facility ID Nos. 52152
KXBA(FM) Nikiski, Alaska;	)	86717
KWW-FM, Homer, Alaska; and	)	52145
KPEN-FM, Soldotna, Alaska	)	52149
)	
Licensee of FM translator stations)	
K292ED, Kachemak City, Alaska	)	52150
K285DU, Homer, Alaska;	)	52157
K285EG and K272DG, Seward, Alaska	)	52158 and 52160
)	
Former licensee of FM translator)	
stations)	
K285EF, Kenai, Alaska;)	
K283AB, Kenai/Soldotna, Alaska;)	
K257DB, Anchor Point, Alaska;)	
K265CK, Kachemak City, Alaska;)	
K272CN, Homer, Alaska; and)	
K274AB and K285AA, Kodiak, Alaska)	

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HERITAGE REPORTING CORPORATION

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Before the
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Washington, D.C. 20554

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Conference Room 365
Federal Communications Comm.
445 12th Street, S.W.
Washington, D.C.

Thursday,
September 26, 2002

The parties met, pursuant to the notice of the
Judge at 9:00 a.m.

BEFORE: HONORABLE RICHARD SIPPEL
Judge

Heritage Reporting Corporation
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APPEARANCES:

On behalf of the FCC:

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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
John C. Davis	454	483	523		456
		491			
Sheree L. Brewer	530	555	563		531
	538				540
	543				550
Dennis Bookey	565	572			567
Andrew Tierney	584	587	608	612	584

E X H I B I T SIDENTIFIEDRECEIVEDREJECTEDEnforcement Bureau's:

30	450	451
31	454	483
32	530	554
32A	554	554
33	565	571
34	583	587

Peninsula Communications, Inc.:

2	492	511
3	511	519

P R O C E E D I N G S

9:00 a.m.

JUDGE SIPPEL: Good morning, we are here to take additional testimony. The Bureau is continuing to present its case. Do we have a witness this morning?

MS. LANCASTER: Your Honor, our witnesses have been delayed on the Metro. We called them just a few minutes ago. They're on their way, but they have not yet arrived.

As a preliminary matter, though, I would ask that we be able to go ahead and put in the deposition of Eileen Becker, if we could do that?

JUDGE SIPPEL: Has this been worked out ahead of time? Is there any objection to this?

MR. SOUTHMAYD: I don't object to putting the deposition in the record, Your Honor.

JUDGE SIPPEL: Okay. All right.

MS. LANCASTER: I believe this Exhibit is EB 30, I believe.

JUDGE SIPPEL: I think you are right but let me check. Thank you. That is correct, 30 is the next number, unless we want to put this in as 23?

MS. LANCASTER: If you prefer that. It doesn't make any difference to me.

JUDGE SIPPEL: No, let us stay with this. We **will**

1 mark this as 30. All right. This is the deposition of Mrs.
2 Eileen Becker. It was taken on August 15, 2002 in Homer,
3 **Alaska**, consisting of it looks like 366 pages, including the
4 Reporter's certificate.

5 (The document referred to was
6 marked for identification as
7 Enforcement Bureau's Exhibit
8 30.)

9 MR. SHOOK: Your Honor, in terms of the page
10 numbering, the --

11 JUDGE SIPPEL: I see.

12 MR. SHOOK: -- it starts at a much later page
13 For some reason, the Court Reporter numbered all the
14 depositions consecutively.

15 JUDGE SIPPEL: Consecutively, I see. All right.
16 Forget about them. Disregard my take on the number of
17 pages. We will just have to hand count that later. But, in
18 any event, this deposition is now marked as the Bureau's
19 Exhibit 30 for identification. Mr. Southmayd, you have
20 indicated you are not going to enter any objection?

21 MR. SOUTHMAYD: Correct.

22 JUDGE SIPPEL: It is now Exhibit 30 for
23 identification and is now received in evidence as the
24 Bureau's Exhibit 30.

25 Is there anything else that we can do while we

1 wait for the witnesses?

2 (The document referred to,
3 previously marked for
4 identification as Enforcement
5 Bureau's Exhibit 30, was
6 received in evidence.)

7 MR. SOUTHMAYD: Your Honor, yesterday, and I don't
8 know what your disposition is to discuss this, you had
9 proposed dates for findings and so forth?

10 JUDGE SIPPEL: Yes, I did. Yes.

11 MR. SOUTHMAYD: **As** I think Your Honor is aware, in
12 this case, we're also involved in a proceeding at the U.S.
13 Court of Appeals and we're in our pleading cycle, which ends
14 right at the time that Your Honor had tentatively proposed
15 for the proposed findings of fact and conclusions of law to
16 be due.

17 JUDGE SIPPEL: Right.

18 MR. SOUTHMAYD: I was wondering if we could move
19 that farther back, so that there was not the conflict of
20 submitting our final brief in the U.S. Court of Appeals and
21 the proposed findings of fact and conclusions of law at the
22 same time.

23 JUDGE SIPPEL: What kind of a time frame would you
24 be thinking of? I think I had the 26th of November for
25 proposed findings.

1 MR. SOUTHMAYD: If I could get a week more, that
2 would be very helpful?

3 JUDGE SIPPEL: What does the Bureau feel about
4 that? I am not worried about the time passage, it is just
5 that --

6 MR. SHOOK: What day of the week would that be?

7 MR. SOUTHMAYD: I think it's a Tuesday. Let me
8 look.

9 MS. LANCASTER: Your Honor, may I speak?

10 JUDGE SIPPEL: Sure.

11 MS. LANCASTER: My only concern about that is, if
12 you're going to move everything back a week, that puts our
13 reply due on Christmas Eve and I'm not real excited about
14 that.

15 JUDGE SIPPEL: Well, that is not going to happen.
16 Let us see how we can adjust that in.

17 MR. SOUTHMAYD: December 3rd is a Tuesday.

18 MR. SHOOK: That would be acceptable.

19 MR. SOUTHMAYD: And then the 18th is -- how about
20 January 8th? January 1 is a Wednesday.

21 MS. LANCASTER: I will be out of town that week.

22 MR. SOUTHMAYD: How about the 15th? That's a
23 Wednesday.

24 MR. SHOOK: I have no problem with that.

25 MR. SOUTHMAYD: Now bear with me just one moment,

1 Your Honor, if we could. I have oral argument on January
2 14th. I hate to have a reply finding for the next day.

3 MR. SHOOK: Well, presumably, though, most of the
4 work would have been completed well before the 15th. I
5 mean, you moved it to the 15th largely to accommodate us.

6 MR. SOUTHMAYD: I think that would be fine. Maybe
7 the 16th, Thursday the 16th for a reply?

8 JUDGE SIPPEL: All right, let's go off the record.

9 (Discussion held off the record.)

10 JUDGE SIPPEL: Okay, Madame Reporter, are we on?
11 We are changing the dates for proposed findings and for
12 reply findings. The proposed findings and conclusions of
13 law would be filed and exchanged on the 10th of December,
14 2002, and the reply proposed findings and conclusions will
15 be filed and exchanged on January 16th of the year 2003.

16 That is it. We are still awaiting witnesses.
17 Let's go off the record.

18 (Discussion held off the record.)

19 JUDGE SIPPEL: All right, you have your witness,
20 Ms. Lancaster.

21 MS. LANCASTER: Mr. Shook is going to examine this
22 witness, Your Honor.

23 JUDGE SIPPEL: Mr. Shook?

24 MR. SHOOK: Your Honor, I'm giving the Court
25 Reporter testimony of John C. Davis, marked for

1 identification as Enforcement Bureau Exhibit 31. A copy of
2 the testimony has previously been given to yourself and
3 counsel for Peninsula. I am going to place a copy of his
4 testimony in front of Mr. Davis.

5 (The document referred to was
6 marked for identification as
7 Enforcement Bureau's Exhibit
8 31.)

9 JUDGE SIPPEL: All right. Let me ask Mr. Davis **to**
10 state his name for the record.

11 MR. DAVIS: My name is John Callen, C-A-L-L-E-N,
12 Davis, D-A-V-I-S.

13 JUDGE SIPPEL: Would you please rise and raise
14 your right hand?
15 Whereupon,

16 JOHN C. DAVIS
17 having been duly sworn, was called as a witness
18 and was examined and testified as follows:

19 JUDGE SIPPEL: Thank you, sir. Would you please
20 be seated, Mr. Davis, and state your address?

21 THE WITNESS: My address is: 48590 KSRM Court,
22 Kenai, K-E-N-A-I, Alaska, A-K, 99611.

23 JUDGE SIPPEL: **Mr.** Shook?

24 DIRECT EXAMINATION

25 BY MR. SHOOK:

1 Q Mr. Davis, the document that you have in front of
2 you, do you recognize it?

3 A Yes, I do.

4 Q Could you tell us what it is?

5 A It's the testimony of John C. Davis, my testimony
6 that I gave you.

7 Q Is there a signature that appears on page five of
8 the document?

9 A **Yes**, there is.

10 Q Is that signature yours?

11 A Yes, it is.

12 Q Mr. Davis, I recognize that you haven't had a
13 chance to take a look at your testimony again in the
14 courtroom, so if you would please take a moment to look
15 through it.

16 A Okay.

17 JUDGE SIPPEL: Let's go off the record while he
18 looks through it.

19 (Discussion held off the record.)

20 JUDGE SIPPEL: Okay, I am sorry, would you repeat
21 that comment, please?

22 THE WITNESS: I left the copy that I had at home.
23 I don't know if it makes any difference, but I signed this
24 final page here. But it is exactly the same thing.

25 BY MR. SHOOK:

1 Q Is there anything that you wish to change in the
2 testimony that you have in front of you?

3 A No. I've reviewed it thoroughly.

4 Q And it is true to the best of your knowledge?

5 A Yes, it is.

6 MR. SHOOK: Your Honor, I offer it as Enforcement
7 Bureau Exhibit 32.

8 JUDGE SIPPEL: Mr. Southmayd?

9 MR. SOUTHMAYD: Your Honor, may I have some
10 preliminary qualifying voir dire?

11 JUDGE SIPPEL: You certainly may. Proceed.

12 MR. SOUTHMAYD: Thank you.

13 VOIR DIRE EXAMINATION

14 BY MR. SOUTHMAYD:

15 Q Good morning, Mr. Davis.

16 A Good morning.

17 Q You note in your testimony, at Paragraph 1, that
18 you are Chief Executive Officer and majority shareholder in
19 KSRM. Can you tell me what is your majority-shareholder
20 percentage?

21 A It's 94 percent.

22 Q who holds the other 6 percent?

23 A My mother. Her name is Katherine Josephine Davis,
24 D-A-V-I-S. Katherine with a K.

25 Q Thank you. Mr. Davis, what is your day-to-day

1 occupation?

2 A My day-to-day occupation is President of KSRM,
3 Incorporated and President of Soldotna Business Plaza,
4 Incorporated and President of Lake Country Air,
5 Incorporated. I spend quite a lot of time at my radio
6 stations.

7 Q By my radio stations, do you mean KSRM-AM, KWHQ-
8 FM, Kenai, Alaska and KSLD-AM and KKSI-FM, Soldotna, Alaska?

9 A Mm-hmm.

10 Q Are those stations located in any particular radio
11 market or geographic area?

12 A They're located in Kenai and Soldotna, the Greater
13 Kenai and Soldotna Central Peninsula area.

14 Q Thank you. Mr. Davis, are you familiar with a
15 company known as Peninsula Communications, Inc.?

16 A Certainly, yes.

17 Q Do they operate radio stations in this Kenai,
18 Soldotna Peninsula market?

19 A Yes, they do.

20 Q Do you know what those stations are?

21 A They have one that is called KPEN-FM. They call
22 one of them K-Bay. I think it's KXBA, KXBA, but I'm not
23 certain.

24 Q Is that an **AM** or an FM?

25 A That's an FM.

1 Q Any others that you're aware of?

2 A Not in my market.

3 Q Prior to May of 2002, were there any additional
4 peninsula stations operating in that market?

5 A Prior to 2002? There's KDLL.

6 Q I'm asking about peninsula stations?

7 A Oh, not that I know of, not in that market.

8 Q Mr. Davis, have you ever owned or been involved in
9 a business that has purchased advertising on the peninsula
10 stations in your market?

11 A I really don't know. I could have, certainly
12 could have.

13 Q To the best of your knowledge, have you ever?

14 A I really don't know, but I would say this, running
15 for political office and being a politician, I probably no
16 doubt did. I can't say for sure.

17 Q Mr. Davis, have you ever owned or been involved in
18 an advertising agency that has purchased advertising on the
19 peninsula stations?

20 A No.

21 Q Mr. Davis, have the KSRM stations ever purchased
22 advertising on the peninsula stations?

23 A Say that again?

24 Q Have any of the KSRM, Inc. stations ever purchased
25 advertising on the peninsula stations?

A Not that I know of.

2 Q Have you ever worked for Peninsula Communications,
3 Inc.?

4 A No, sir.

5 Q Would that mean, therefore, that you have never
6 worked in the Accounting Department of Peninsula
7 Communications, Inc.?

8 A I've never been in the Accounting Department of
9 Peninsula, Inc.

10 Q Have you ever reviewed monthly operating
11 statements for any of the Peninsula Communications, Inc.
12 stations?

13 A Not that I know of.

14 Q Mr. Davis, who wrote your testimony?

15 A The testimony was written by someone at the FCC.
16 I would imagine it was Jim Shook.

17 Q So this wasn't prepared by you?

18 A No, he prepared the testimony from the deposition
19 he took and sent it to me. I reviewed it for some period of
20 time, reading it many times. I made changes to it,
21 corrected it, and sent it back to him.

22 Q Thank you. Mr. Davis, in addition to the KSRM
23 stations and the peninsula stations you've mentioned, are
24 there other stations that sell advertising in the Kenai,
25 Soldotna Peninsula market, to the best of your knowledge?

1 A Yes, there are.

2 Q Does KAFC-FM, Anchorage, Alaska, sell advertising
3 in your market?

4 A I really couldn't say for sure. I know they get -
5 - they have donations from there. I don't know if they seek
6 them -- they must seek them.

7 Q How about KFQD-AM, Anchorage, Alaska?

8 A Yes, they have sold advertising in our market

9 Q Do they generate advertising revenue in your
10 market?

11 A They have.

12 Q How about KENI-AM?

13 A Not that I know of, but --

14 Q How about KWHC-FM?

15 A I'm not familiar with the station.

16 Q How about KFAT-FM?

17 A These are all Anchorage stations. They may have
18 salespeople on the street from time to time. I have no
19 idea. No, I would say no, to my knowledge.

20 Q How about KWHL?

21 A KWHL? To my knowledge, they haven't, but maybe
22 they do. I think they've had a concert down there, down at
23 my place.

24 Q To your knowledge, do the Anchorage stations as a
25 group, putting aside the individual stations, take revenue

1 out of the Kenai, Soldotna market?

2 A None that I know of in recent years.

3 Q Is there a cable system operating in the Kenai,
4 Soldotna market?

5 A Yes, there is.

6 Q Do they sell advertising?

7 A Yes, they do.

8 Q Is there a newspaper in the Kenai, Soldotna
9 Peninsula market?

10 A Yes, there is.

11 Q Do they sell advertising?

12 A Yes.

13 JUDGE SIPPEL: This sounds like a little more than
14 voir dire. Are you going into your cross-examination?

15 MR. SOUTHMAYD: No, sir. Actually, it is voir
16 dire and I am just about finished.

17 JUDGE SIPPEL: All right.

18 MR. SOUTHMAYD: I'm sorry if I prolonged it, Your
19 Honor. I think much of what I'm attempting to establish
20 here will inure to the other witnesses, as well, based on
21 their testimony.

22 BY MR. SOUTHMAYD:

23 Q Mr. Davis, have you ever owned an advertising
24 agency or worked at one in Anchorage, Alaska that purchased
25 advertising on any of the peninsula stations?

1 A How do you mean, worked at?

2 Q Were you employed by an advertising agency in
3 Anchorage, Alaska at any time?

4 A No.

5 Q Were you employed by an advertising agency in
6 Seattle, Washington at any time that purchased advertising
7 on the peninsula stations?

8 A No.

9 MR. SOUTHMAYD: Okay, that's my preliminary voir
10 dire.

11 JUDGE SIPPEL: Do you have any objection to
12 receiving this into evidence, then?

13 MR. SOUTHMAYD: Yes, I do.

14 JUDGE SIPPEL: What is the basis of your
15 objection, or what portions?

16 MR. SOUTHMAYD: Yes, sir. Going to Paragraph 2 of
17 the testimony, he discusses, compares his company's
18 operation and establishment of a extra translator (phonetic)
19 in Homer, Alaska, which has no bearing or relevance to the
20 designated issue in this proceeding, which is Mr. Becker's
21 operation of translators in Alaska. The fact he's operated
22 a translator is irrelevant.

23 JUDGE SIPPEL: Mr. Shook?

24 MR. SHOOK: This is largely background. It
25 identifies who Mr. Davis is and that he operated as a

1 competitor of Peninsula in the area and that he had a
2 translator that was basically akin to the translator or
3 translators that Peninsula ended up establishing.

4 The translator in question has been the subject of
5 testimony from Mr. Becker. It is also the subject of an
6 order that is part of both the official notice exhibits, as
7 Official Notice Exhibit 1; and as part of Peninsula's
8 Exhibits, as PCI Exhibit 1B. This is the very translator
9 that is being discussed in that order.

10 JUDGE SIPPEL: Well, okay. Now let me first of
11 all, let me ask you, Mr. Shook, just what is the proffer of
12 the relevance of that information that you just talked
13 about, other than the fact that it is in the recognized
14 places? Is this a translator that -- we will have to ask
15 the witness this question: But is your theory here that his
16 translator here competes with the translators that --

17 MR. SHOOK: His translator in Homer competed with
18 Peninsula in Homer.

19 JUDGE SIPPEL: Okay. What is the basis of your
20 objection?

21 MR. SOUTHMAYD: Because it ceased to exist in 1994
22 and has not competed with the translators in this proceeding
23 in eight years; and, particularly, didn't compete during the
24 period in question, over the period of the last year. And,
25 moreover, once this gets in, now there's a second paragraph,

1 Paragraph 3 , again going into the operation of his
2 translator in Homer, Alaska, which is completely irrelevant.

3 JUDGE SIPPEL: Same one, same translator?

4 MR. SOUTHMAYD: Yes, sir.

5 JUDGE SIPPEL: Let me just stop right there, then.
6 In 1994, you said it ceased operations?

7 MR. SOUTHMAYD: That's my understanding. We could
8 ask Mr. Davis.

9 JUDGE SIPPEL: Is that right, Mr. Davis?

10 THE WITNESS: Yes.

11 JUDGE SIPPEL: All right. Hold on just a second.

12 MR. SHOOK: What's significant is why.

13 JUDGE SIPPEL: What is significant is why?

14 MR. SHOOK: Why it stopped.

15 JUDGE SIPPEL: Even in 1994?

16 MR. SHOOK: Especially in 1994.

17 JUDGE SIPPEL: **All** right.

18 MR. SOUTHMAYD: It might be significant, but
19 there's nothing about that in this Paragraph 2 or 3.

20 JUDGE SIPPEL: Well, I am going to permit and I am
21 going to overrule the objection. I believe Mr. Shook has
22 shown enough of a foundation to receive it in, if nothing
23 more for background, and we will see where it goes

24 Any other objections to this?

25 MR. SOUTHMAYD: Yes, sir, and I assume that goes

1 to Paragraph 3, as well?

2 JUDGE SIPPEL: Yes, it does. Yes, it does.

3 MR. SOUTHMAYD: And Paragraph 4 is again more
4 background on his translator in Homer and I assume
5 consistent with Your Honor's previous ruling that this is
6 relevant and in the record?

7 JUDGE SIPPEL: Well, it is relevant enough. I
8 have been liberal with Peninsula and I'm being fairly
9 liberal here. But the answer to your question is yes. So
10 you have got to find something that is really going to stick
11 out here.

12 MR. SOUTHMAYD: Okay, Paragraph 5, we would ask
13 that this paragraph be struck in its entirety. It's clear
14 hearsay. For example, Paragraph 2, the witness indicates
15 what Peninsula argued.

16 JUDGE SIPPEL: Well, we are in Paragraph 5 now.
17 Where are you saying?

18 MR. SOUTHMAYD: Sentence two.

19 JUDGE SIPPEL: All right. Mr. Shook?

20 MR. SHOOK: Your Honor, it continues to be
21 background. It is specifically referenced in the PCI
22 Exhibit 1B.

23 JUDGE SIPPEL: All right. Well, the witness is
24 here and he can be cross-examined on it. And certainly
25 Peninsula is in a position, it being in Court right now,

1 too, to assess the truth or accuracy of that statement and
2 to test his credibility. So I am going to overrule that
3 objection.

4 MR. SOUTHMAYD: On page three, Paragraph 7, the
5 sentence beginning: The super-station concept allowed
6 Peninsula to sell commercial time on its stations to
7 advertising agencies in Anchorage, Seattle and other cities
8 outside of Alaska, and so forth and so on. The witness has
9 indicated that he has never owned or worked for any
10 advertising agencies, nor with Peninsula Communications;
11 and, therefore, has no actual knowledge of what Peninsula
12 Communications did; and, more particularly, what may have
13 gone on with advertising agencies in Anchorage, Seattle and
14 other cities. It's clearly just speculation.

15 JUDGE SIPPEL: Well, I will let you cross-examine
16 him at length about that. The witness is here, he is down
17 here, he comes from that area. Certainly, he is in the
18 business of operating radio stations in that area. I think
19 that his testimony should stay to that extent. All these
20 points that you are raising now are legitimate questions for
21 cross-examination on the weight and on the credibility.

22 MR. SOUTHMAYD: Thank you, Your Honor.

23 JUDGE SIPPEL: I am going to overrule the
24 objection.

25 MR. SOUTHMAYD: Paragraph 3, the sentence at the

1 bottom beginning: Thus, even though KSRM Station had the
2 bulk of the listening audience.

3 JUDGE SIPPEL: I am sorry, did you say Paragraph
4 3?

5 MR. SOUTHMAYD: Page 3, Paragraph 7.

6 JUDGE SIPPEL: Yes, all right.

7 MR. SOUTHMAYD: At the bottom: Thus, we lost
8 potential sales to Peninsula because it continued to operate
9 its other area translators after it should have shut them
10 down.

11 Several objections. One is, we've established
12 that there are other advertising sources for revenues,
13 including stations from Anchorage, Alaska; and this is sheer
14 speculation to the extent they may have lost revenue. Where
15 they lost them to, particularly in light of his testimony,
16 he's never seen a financial statement of Peninsula, has no
17 idea what sort of advertising revenues they have or anything
18 else.

19 And secondly, after it should have shut them down
20 is a conclusion of some sort that's completely unsupported
21 by anything in his testimony.

22 JUDGE SIPPEL: Well, you certainly have a good
23 point there. I am going to strike: after it should have
24 been shut down. And if the witness can put a date in there
25 that he is, an on or about date, I will permit him to do

1 that on redirect. Or you can ask him that question right
2 now if you want to, Mr. Shook?

3 But that language is coming out on the basis of
4 Mr. Southmayd's objection. When I say that language, let me
5 be sure. It is the last line on page 3 and it is the words:
6 after it should have shut them down. That language is
7 stricken. Mr. Shook?

8 MR. SHOOK: Your Honor, I'll wait till redirect.

9 JUDGE SIPPEL: All right. Next objection?

10 MR. SOUTHMAYD: Page 4, Paragraph 8 should be
11 stricken. Again, Mr. Davis refers to: "Peninsula's illegal
12 operation of its other area translators," which makes a
13 legal conclusion unsupported by the evidence here. And I
14 would submit, even if relevant, unduly prejudicial and of no
15 real value to the record that, in his opinion, apparently
16 Peninsula's operation was illegal.

17 MR. SHOOK: Your Honor, I would point out that the
18 Official Notice Exhibits, beginning with Official Notice
19 Exhibit 7, continually advance the conclusion on the part of
20 the FCC and its staff that authored the various letters that
21 the operation of Peninsula's other area translators should
22 have stopped by June 1, 1994. Hence, their operation after
23 that period, by these letters, is illegal.

24 JUDGE SIPPEL: Well, does that have any bearing on
25 the May 2001 order that we are concerned with here? This is

1 a prior issue?

2 MR. SHOOK: No, it's the culmination.

3 JUDGE SIPPEL: The culmination of the whole thing?

4 All right. It is the culmination. What I am going to do
5 is, I will permit that to be from this witness' standpoint,
6 we can strike illegal and insert allegedly unauthorized.
7 That is what this hearing is all about and I certainly do
8 not want to have a competitor coming in from Alaska and
9 giving legal conclusions in his testimony.

10 I do not think it is fair to that witness and I do
11 not think it is fair to Peninsula.

12 MR. SHOOK: Your Honor, with respect to that
13 point, I would note that -- Your Honor, I think the point
14 that I'm about to make is perhaps something that should not
15 be uttered in the presence of the witness.

16 JUDGE SIPPEL: We will excuse you. Mr. Davis,
17 would you please step outside the courtroom door? You can
18 use the facilities if you want. Do not wander too far with
19 your red badge.

20 MR. SHOOK: Thank you.

21 JUDGE SIPPEL: Yes?

22 MR. SHOOK: Your Honor, for the last two days, Mr.
23 Becker has testified continually about the legality of his
24 operations and the various theories that he has advanced and
25 come up with in order to somehow justify the operation of

1 his translators.

2 He has interpreted statutes; he has interpreted
3 rules. I don't see where what Mr. Davis has to say here is
4 any different from what Mr. Becker has been testifying
5 about.

6 MR. SOUTHMAYD: Well, Your Honor, Mr. Davis isn't
7 interpreting any rules or making any claim. He's just
8 making a blanket generalization. It's really unnecessary
9 and it doesn't help the record. It's not factual. It's his
10 opinion.

11 MR. SHOOK: Well, then it could be received as
12 such.

13 JUDGE SIPPEL: Well, then that opens up an area
14 for cross-examination that does not need to be in here. **All**
15 it is really doing is talking about a time frame. He
16 testifies to events that happened in a time frame which, I
17 think it is perfectly proper to call that they were
18 allegedly unauthorized transmissions of the station. Why
19 does he care whether it was illegal or not? In terms -- **he**
20 is testifying as a fact witness in terms of what happened
21 during that time period.

22 MR. SHOOK: And the impact that it has had on his
23 business.

24 JUDGE SIPPEL: Right. I am letting an awful lot
25 in, but why should he have to, or why he should be put in

1 the position of having to testify as to the legality. That
2 is not his job.

3 MR. SHOOK: Well, so, if I understand what's going
4 on here at this point, the only thing that has changed *is*
5 the word illegal --

6 JUDGE SIPPEL: That is all.

7 MR. SHOOK: -- to the words allegedly
8 unauthorized?

9 JUDGE SIPPEL: That is what has been objected to.

10 MR. SHOOK: Right.

11 JUDGE SIPPEL: And I think Mr. Southrnayd has a
12 point. I think that is what this hearing is all about.

13 MR. SHOOK: I wasn't sure if that objection was
14 going to anything else, but if that's all we're talking
15 about?

16 JUDGE SIPPEL: No. That is all we are talking
17 about.

18 MR. SOUTHMAYD: Well, at this point, I do --

19 JUDGE SIPPEL: Well, at this point.

20 MR. SOUTHMAYD: I do have a further objection in
21 that sentence.

22 JUDGE SIPPEL: *Yes*, well, that is a different
23 issue. Do you want to call the witness back in then? Can
24 we do that?

25 MR. SHOOK: Sure.

1 JUDGE SIPPEL: Let's go off the record.

2 (Discussion held off the record.)

3 JUDGE SIPPEL: Mr. Davis, you are back on the
4 stand. We have had this discussion in your absence about
5 whether or not it is appropriate for you to testify as to
6 the legality of the operation. I have taken the position as
7 the presiding Judge that I do not think that is appropriate.

8 This is nothing personal. It is a very technical
9 ruling. I am substituting for illegal, I am taking that
10 word out and inserting instead it is an allegedly
11 unauthorized operation. Okay. Let's go from there.

12 MR. SOUTHMAYD: Your Honor, Page 4, Paragraph 8,
13 that same sentence, the phrase: For the simple reason that
14 Peninsula's costs in the Kenai, Soldotna market (as well as
15 the Kodiak and Seward markets) were always going to be lower
16 than its full-powered competitors.

17 We object. There is no factual basis. Mr. Davis
18 has indicated he is not familiar with Peninsula's
19 operations, their expenses, their finances and there's no
20 factual basis to know whether their costs are less than
21 other stations.

22 JUDGE SIPPEL: Well, I will let you go back and
23 develop that further on cross-examination if you care to,
24 but I am going to allow him to testify to that. What he is
25 talking about goes to the weight of it and its credibility.

1 These are perfectly appropriate objections and perfectly
2 appropriate areas to cover as much as you want on cross-
3 examination, but I am going to let him testify to it on
4 cross.

5 Next objection?

6 MR. SOUTHMAYD: Faragraph 8, the last sentence:
7 Thus, as a practical matter, any money spent for advertising
8 in Kodiak and Seward goes to Homer, where Peninsula is
9 situated. Little or none stays in Kodiak and Seward.

10 We object on relevance grounds. There's no
11 factual basis for that conclusion and frankly, I have no
12 idea what it means.

13 MR. SHOOK: Your Honor, these are logical
14 conclusions developed from the rest of the information in
15 the paragraph.

16 JUDGE SIPPEL: Well, is this what his opinion is?

17 MR. SHOOK: Well, based on the fact that he has
18 operated radio stations in that market for 30 years.

19 JUDGE SIPPEL: I know, but my question is: Is that
20 his opinion? It does not say that in the sentence. I am
21 saying, it sounds to me like he is giving his opinion.

22 MR. SHOOK: Certainly, it is his opinion.

23 JUDGE SIPPEL: Okay, well, then, why don't we just
24 say that: Thus, in my opinion.

25 MR. SHOOK: That's fine.

1 JUDGE SIPPEL: And I will say this. I am getting
2 ahead of you a little bit maybe, Mr. Southmayd, but I have
3 obviously made the mental calculation that I think this
4 person does qualify as a lay business person who can give an
5 opinion. Now the weight, again, we are back to weight and
6 credibility and that is your job.

7 So that sentence will read, this is now the last
8 sentence of Paragraph 8 on Page 4: Thus, in my opinion, as a
9 practical matter, etc. The rest of the sentence stays as it
10 is.

11 Next objection?

12 MR. SOUTHMAYD: Paragraph 9: "As noted above,
13 KSRM, Inc. shut down its translator in Homer on June 1,
14 1994. KSRM took this action in order to abide by the FCC's
15 directives concerning 'other area translators.'" The
16 objectionable part: "Essentially, KSRM, Inc. has been
17 punished for complying with the FCC's rules because its
18 principal competitor, Peninsula, did not comply."

19 It's inconsistent with the prior statement that
20 they took the action in order to abide by the FCC's rules.
21 It's a legal conclusion. There is no foundation. He's not
22 qualified to make it.

23 MR. SHOOK: Your Honor, this is not a legal
24 conclusion by any stretch. It's a practical conclusion
25 because there was income that was being derived by the

1 translator that KSRM, Inc. was operating in Homer. And by
2 shutting that translator down, that source of income
3 stopped.

4 JUDGE SIPPEL: And there was an order from the
5 Commission to do so. Is that right?

6 MR. SHOOK: A report and order?

7 MR. SOUTHMAYD: That's a matter at issue, Your
8 Honor: Whether the report and order required him to cease
9 operation. It's a legal conclusion.

10 We, obviously, maintain that under the Wrangell
11 Radio Group Footnote 59, he was not required to terminate
12 his operation. In that event, if he was punished by anyone,
13 he was punished by himself for doing it.

14 JUDGE SIPPEL: Well, the inference there is, I
15 guess it is one of these things where, perhaps, reasonable
16 minds can differ and that was his take on it. I am not
17 drawing any -- I am not going to commit as to what I am
18 going to do at the end of this case, obviously.

19 But I am saying, by allowing that in, it does not
20 mean that I am going to accept that as being the rule of the
21 case with respect to all these FCC orders. These orders do
22 not have to -- each one of these issues is going to be
23 resolved on its face at the end of the case after everything
24 is in. Not now.

25 I understand what you are saying and I am trying

1 to do it both ways. This is a mixed question of fact and
2 law, but I think it is more fact than it is law.

3 If this is why the witness shut it down, that is
4 his business. It is not my business; it is not your
5 business. But you can ask him; and, if you want to question
6 his credibility, you can ask him. So I am going to overrule
7 the objection.

8 MR. SOUTHMAYD: Thank you, Your Honor. The last
9 sentence in Paragraph 9: Whereas, even after the FCC told
10 Peninsula in 2001 to shut down the Kenai, Soldotna and
11 Kodiak translators, Peninsula refused to stop their
12 operations; and thereby garnered income which could have
13 gone to KSRM, Inc. or the licensee of the Kodiak station.

14 My objection is that it is purely speculative that
15 any income that my client may have garnered, and there's no
16 evidence that he did, may have gone or could have gone to
17 Mr. Davis. And licensee of Kodiak stations, we have no idea
18 what he's talking about there.

19 JUDGE SIPPEL: Okay. So, let's see if Mr. Shook
20 can add --

21 MR. SHOOK: Well, again, this is a factual
22 opinion, or an opinion that is based on Mr. Davis's
23 experience in operating radio stations in the Kenai,
24 Soldotna market for 30 years. And it's a logical conclusion
25 that flows from the fact that there is income being derived

1 by Peninsula in the Kenai, Soldotna area in part because of
2 the operation of the translators.

3 If those translators were not operating, then the
4 question is: Where does some of that income go? It would
5 seem to me that Mr. Davis is uniquely situated to render an
6 opinion that some of such income would have gone to his
7 stations.

8 JUDGE SIPPEL: Well, I would surmise that this is
9 one of these economic conclusions that, if we brought an
10 economist in here and he went over the market, reviewed the
11 market and reviewed Mr. Davis's business records, he would
12 be able to give us 250 reasons as to why that income was
13 going to go someplace else other than into Mr. Davis's
14 coffers.

15 So you all have to be sure of what I am saying:
16 This is highly speculative. I would stop after the word
17 "operations" and strike everything out after that.

18 MR. SHOOK: So what is Your Honor doing?

19 JUDGE SIPPEL: I am stopping at: Peninsula refused
20 to stop their operations. I am taking everything else out,
21 the words: and thereby garnered income which could have gone
22 to KSRM or the licensee of the Kodiak stations.

23 If you want to make that argument based on
24 everything after operations, in your post-findings and
25 conclusions, that is fine. But we have no way of knowing

1 that is a fact.

2 MR. SHOOK: Your Honor, one last point, though. I
3 don't see why it is that Mr. Davis could not render an
4 opinion relative to where that income could have gone,
5 considering the background that he has in radio station
6 operations and what he has to do to compete, to earn a
7 dollar in that market?

8 JUDGE SIPPEL: Because it is too self-serving.
9 Obviously, if Mr. Davis wants to testify to this, he is
10 going to want to testify to it in a way that is going to
11 make it look better for him as far as income is concerned.
12 Why would he testify as to all the other alternatives with
13 respect to how that lost income might be used from that
14 area?

15 You do not know that it is going to go to him. He
16 does not know that for sure. This is not an opinion; this
17 goes from opinion to speculation. I give him on the opinion
18 side, but this is speculation.

19 You want to make the argument, if you think that
20 you can make an argument based on the record that this
21 income would have gone to a specific place, then fine, you
22 can make an argument.

23 **All** right. Now, do you have any other evidence to
24 show this? Has there been any kind of an economic analysis
25 done of this?

1 MR. SHOOK: Your Honor, I believe in the voir dire
2 that Mr. Southmayd brought out with respect to radio
3 stations, that there was one other radio station that was in
4 the market that wasn't licensed either to Peninsula or to
5 KSRM and that was the KDLL station, I believe?

6 JUDGE SIPPEL: All right.

7 MR. SHOOK: And it's my understanding that that
8 radio station is not a commercial radio station. So if
9 Peninsula was no longer -- or if Peninsula's ability to
10 compete was reduced in some significant fashion as a
11 consequence of its not having the translators anymore in the
12 Kenai, Soldotna market to rebroadcast KWBB-FM, that those
13 radio dollars have to go someplace.

14 MR. SOUTHMAYD: We have established, Your Honor,
15 that there's a newspaper, there's a cable system that sells
16 advertising, and there are stations from Anchorage that the
17 witness indicated sold advertising in the market.

18 JUDGE SIPPEL: Well, you are right, but I am
19 looking at this language again and I am hearing Mr. Shook,
20 that is true. He is using **the** word -- it doesn't say which
21 "would" have gone. He is using the word, which "could" have
22 gone. And I would be more inclined to take this, if it said
23 which possibly could have gone, but it **is** all right.

24 MR. SHOOK: If we add the word possibly to that,
25 that's perfectly acceptable.